



COMMISSION MEETING MINUTES
December 20, 2004

The Commissioners of the Texas Alcoholic Beverage Commission met in Regular Session on Monday, December 20, 2004, at the Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Suite 185, Austin, Texas.

PRESIDING: John T. Steen, Jr., Chairman

PRESENT: Jose Cuevas, Jr., Commissioner
Gail Madden, Commissioner

STAFF PRESENT: Glenda Baker, Assistant Chief of Enforcement
Carolyn Beck, Public Information Officer,
Executive
Lou Bright, General Counsel, Executive
Mitch Dill, Sergeant, Bryan Outpost
Del Drake, Office of Professional Responsibility
Loretta Doty, Director, Human Resources
Randy, Field, Agent, Bryan Outpost
Jeannene Fox, Assistant Administrator,
Executive
Buck Fuller, Director, Compliance
David Garza, Director, Homeland Security,
Executive
Steve Greinert, Accounts Examiner, Compliance
Amy Harrison, Director, Licensing
Gary Henderson, Enterprise Operations Team
Leader, Information Resources
James T. Irvin, Radio Shop Telecommunications

Specialist, Business Services
Linda Jackson, Assisting Executive Division
Renee Johnston, Executive Assistant, Executive
Dexter K. Jones, Coordinator of Marketing
Practices, Executive
Jo Ann Joseph, Assistant Director, Licensing
Charlie Kerr, Director, Business Services
Garry Sitz, Director, Information Resources
James "Sam" Smelser, Chief of Enforcement
Gloria Villaseñor, Administrative Assistant,
Enforcement/Grants

GUESTS PRESENT: Dewey Brackin, Attorney, Gardere Wynne Sewell
Glenn Brown, Assistant City Manager, City of
College Station
Rick Donley, President, Beer Alliance of Texas
Doug DuBois, Jr., Director of Membership and
Education, Texas Petroleum Marketers and
Convenience Store Association
Don Fazzino, Manager of Special Projects and
Legislative Affairs, City of College Station
Greg Flores, Director of Legislative Affairs, H-E-B
Glen Garey, General Counsel, Texas Restaurant
Association
Jay Howard, Hillco Partners
Karen Latta, Policy Analyst, Sunset Advisory
Commission
Emilie Leroux, Policy Analyst, Sunset Advisory
Commission
Fred Marosko, Texas Package Stores
Association
M. Jack Martin, Attorney at Law
Mignon McGarry, Consultant, Block/Republic
Mike McKinney, Executive Vice President,
Wholesale Beer Distributors of Texas
Michael Mims, Director of Licensing, H-E-B
Chris Newton, General Counsel, TPCA
Karen Reagan, Vice President, Texas Retailers
Association
Brad Shields, Legislative Associate, Texas

Retailers Association
Patricia Shipton, Government Affairs Consultant,
Coors
Robert Sparks, Executive Director, Licensed
Beverage Distributors, Inc.
Tom Spilman, Vice President, Wholesale Beer
Distributors of Texas
Keith Strama, Attorney, Representing Wholesale
Beer Distributors of Texas
Ralph Townes, President, Glazers

CALL TO ORDER

Chairman John T. Steen, Jr., called the meeting of the Texas Alcoholic Beverage Commission (TABC) to order.

RECOGNITION OF AGENCY EMPLOYEES WITH 20 OR MORE YEARS OF SERVICE

Chairman Steen explained that the November Commission meeting had to be cancelled because of inclement weather and most of the agenda items were carried over to this meeting. However, the reception for the recognition of agency employees with 20 or more years of service went on as planned. Administrator Steen further explained that many of the employees to be recognized were at Headquarters or had already made the trip to Headquarters. Therefore, the agency recognized them with a reception and presented their plaques at that time. The employees were given the option to return to the December Commission meeting to be publicly recognized; however, none were able to attend this meeting. For the record, Chairman Steen announced those who were recognized and stated that the Commissioners would send each of the employees a congratulatory letter:

For 30 years:

Mona Applying, Database Administrator, Information Resources
Oscar Gonzales, Port Supervisor, Progreso Port of Entry

For 25 years:

Debra Lynn Niemtschk, Accounts Examiner, Licensing Division
Don Wilson, Lieutenant, San Antonio District Office

For 20 years:

Jennifer Evans, Processing Section Supervisor, Licensing Division
Doroteo "Fonz" Fonseca, Compliance Officer, Hidalgo Port of Entry

APPROVAL OF COMMISSION MEETING MINUTES OF OCTOBER 25, 2004

Chairman Steen called for a motion to approve the TABC Commission meeting minutes of October 25, 2004. **Commissioner Madden moved that the Commissioners approve the minutes of the October 25, 2004, meeting. Commissioner Cuevas seconded the motion. The motion carried.**

ADMINISTRATOR'S REPORT

Chairman Steen called upon Administrator Alan Steen to provide the Administrator's Report.

Administrator Steen stated that the Health and Safety Committee sponsored a holiday luncheon on December 15 in Headquarters. Administrator Steen thanked Ms. Madden for the cake she sent for the luncheon and expressed appreciation for the efforts of the Health and Safety Committee.

Administrator Steen discussed the Sunset Review of TABC. Public testimony was held on November 16, 2004, and the Sunset Commission's final decisions were made on December 15, 2004. Administrator Steen stated that he was in the process of sending out information to the Commissioners and staff about the decisions. He added that the dissemination of information had begun on December 16 while TABC managers from across the state were attending training at Headquarters.

Administrator Steen covered major areas of the decisions:

- Recommendation 2.2, to authorize the agency to assess penalties according to the economic benefit a licensee may gain through noncompliance, was not adopted by the Sunset Commission.
- New Issue/Recommendation 9: The Legislature should establish a joint interim committee to study revision of the regulatory structure of

alcoholic beverages in Texas. The study should include at least the following:

- A. Placing all responsibility for assessing and collecting taxes with the comptroller;
- B. Licensing only persons or entities that produce, manufacture, brew, or distill regulated substances or sell regulated substances to the public;
- C. Placing all responsibility for the issuance and renewal of licenses with the Texas Department of Licensing and Regulation;
- D. Charging the TABC with enforcing all laws, rules, and regulations applicable to alcoholic beverages to foster, protect, and maintain the health and safety of the citizens of the State of Texas and to promote open markets and competition in the sale of alcoholic beverages; and
- E. Abolishing provisions in the Code related to marketing practices and retailer independence, and instead authorize the TABC to adopt and enforce regulations on those subjects similar to the regulations promulgated by the Alcohol and Tobacco Tax and Trade Bureau for liquor, beer, and wine.

The joint committee shall report its findings and recommendations to the Governor, Lieutenant Governor, and Speaker of the House of Representatives by January 2007.

- New Issue/Recommendation 22: Provide for online issuance of licenses, automatic renewals, and online confirmation of renewals. Provide for online payment of licensee fees. Speed up time frames for sending out certificates. Administrator Steen noted that TABC is currently working to automate its licensing process.
- New Issue/Recommendation 53: Require TABC to establish rules requiring establishments selling alcohol for on-premise consumption to display health warning signs on restroom doors to inform and remind the public of the risks of drinking alcohol during pregnancy.
- New Issues/Recommendations 62 and 63: Amend the Alcoholic Beverage Code to require forfeiture suits filed for seized alcoholic beverages to be conducted according to the provisions of Chapter 59 of the Code of Criminal Procedure. If the Code is amended regarding forfeiture, any change in statute should make it clear that seized

alcoholic beverages deemed by the manufacturer and/or wholesaler to be inappropriate for sale to a consumer should be destroyed, including those that are damaged or beyond the “code date” affixed by the manufacturer.

- Recommendation 6: The Sunset Commission voted to continue TABC for six years, until 2011, rather than 12 years. Administrator Steen noted that this was Code-driven, and not agency-driven.

Administrator Steen stated that staff have taken an aggressive stance in making changes as a result of the management recommendations from Sunset. For example:

- The policies for the Office of Professional Responsibility are ready to go forward and will be presented to the Commissioners at the January Commission meeting. An automated complaint form has been developed, and reporting of the number of complaints to the Commissioners will begin in January.
- In order to utilize information from each region for the agency’s strategic planning process, regional action plans have been developed by each region. These will be measured on a quarterly basis by region and agency-wide. Administrator Steen stated that this will assist the agency to make fact-based decisions.
- TABC has formalized its complaint system. Inspections will be tracked differently than complaints.

Administrator Steen introduced Jo Ann Joseph, TABC’s new Assistant Director of Licensing. He stated that Jeannie Miller, TABC’s Benefits Coordinator, would be leaving TABC to work with the new sheriff; he wished her well in her new endeavors. He also announced that Attorney Dewey Brackin, who has worked with TABC for over 6½ years, has taken a job with a major statewide firm. Administrator Steen commended Mr. Brackin for his diligence with TABC, and stated that Mr. Brackin will be attending TABC Commission meetings in the future.

Administrator Steen discussed the recently completed State Auditor’s Office (SAO) audit on HUB (Historically Underutilized Businesses) usage by TABC and other state agencies. The SAO found that TABC made a

good-faith effort to comply with HUB requirements. The SAO recommended that TABC needed to work on: conducting and advertising in-house marketing presentations; improving its HUB numbers; categorizing the numbers differently; and submitting exception reports even when the numbers to be reported are zero. Administrator Steen stated that TABC has action plans in place and has recently hired a new purchaser/HUB coordinator.

APPROVAL OF PETITION BY THE CITY OF COLLEGE STATION FOR ORDER PERMITTING ADOPTION OF A CENTRAL BUSINESS DISTRICT ORDINANCE PURSUANT TO §109.35 OF THE ALCOHOLIC BEVERAGE CODE

Chairman Steen called upon Lou Bright, General Counsel. Mr. Bright discussed the petition by the City of College Station requesting that TABC adopt an order pursuant to §109.35 of the Texas Alcoholic Beverage Code, that allows the prohibition of the possession of open containers and public consumption of alcoholic beverages in the city's central business district. Mr. Bright recommended that the Commission adopt the order (Attachment 1).

Glen Brown, Assistant City Manager of the City of College Station, addressed the Commissioners, stating that the City of College Station recommended the order as the most expedient way to handle public safety issues in its central business district.

Chairman Steen asked Mr. Bright about past orders, noting that there was an issue with a past petition request by the City of New Braunfels. Mr. Bright briefly explained the issue and noted that all other application requests have been routine. He stated that there were no issues with the City of College Station's application.

Commissioner Madden moved that the Commission authorize adoption of an ordinance prohibiting possession of open containers of alcoholic beverages in the central business district of College Station, as described in the city's petition. Commissioner Cuevas seconded the motion. The motion carried.

Mr. Bright stated that he would present the order to the representatives of the City of College Station.

DISCOUNT PRICING POLICY DETERMINATION

Mr. Bright discussed the relationship between the Alcoholic Beverage Code and certain pricing practices between the wholesale and retail tiers. Specifically, the question concerns what restrictions—if any—the Alcoholic Beverage Code places on the price that wholesalers can charge retailers. The Code contains provisions that some members of the liquor industry may not allow excessive discounts. Also, the Code provides that members of the liquor and beer industry may not provide prizes, premium gifts, or similar inducements to members of the retailers.

Mr. Bright explained that historically, TABC's stance has been that the volume used to price the product must be the volume of sales to a specific location rather than the volume of sales to multiple locations. This, however, has been an issue for some months, with TABC conducting several discussions with industry members. He stated that after careful review, TABC's view is that the practice is not *per se* a violation of the Alcoholic Beverage Code, as the Code does not directly regulate pricing, and it is recognized that volume is a legitimate consideration in determining price. Mr. Bright cautioned, however, that a pricing program that is used to accomplish an unlawful result would be in violation of the Code, and such cases would be prosecuted. He referred the Commissioners to a draft letter on volume discounts (Attachment 2).

Commissioner Madden asked if there would be a downside to this determination, such as hurting "mom and pop" operations. Mr. Bright stated that the Alcoholic Beverage Code had no provision for protecting small businesses and that both large and small operations are regulated under the same set of rules.

Chairman Steen called on Robert Sparks, who had registered to provide public comment. Robert Sparks, of Licensed Beverage Distributors, asked what standard TABC was operating under at this time so that he knows what to tell his people. After some discussion, Administrator Steen clarified that it was being recommended that the letter be sent so that the issue could undergo rulemaking. Chairman Steen noted that the draft letter did not mention rulemaking; Administrator Steen stated that it would be added to the letter.

Greg Flores, Director of Legislative Affairs at H-E-B, addressed the Commissioners, stating that H-E-B applauds TABC for considering the policy determination. He stated that the policy would provide H-E-B and all retailers the opportunity to utilize economies of scale and customary business practices that are already implemented for non-alcoholic beverage products. He stated that H-E-B looked forward to working with the Commission in the implementation of the policy.

Keith Strama, Attorney representing the Wholesale Beer Distributors, stated that he and Mr. Bright have held discussions concerning the issue. He requested that some time be allowed for him to work with Mr. Bright on the language of the letter before it was issued, to ensure it would be clearly understood that the letter is not dealing with pricing issues as they relate to traditional antitrust law.

Rick Donley, Beer Alliance of Texas, stated that he agreed with Mr. Bright's analysis of the framework of how the policy would work. He pointed out that there are other provisions of law that keep a statewide discount based on volume from being mandated on any individual distributor in the state of Texas.

Administrator Steen clarified that there are two distinct methods of distribution in Texas: one for beer and their trade areas and the other for liquor and wine that's not associated with it. He recommended that the letter be issued to the liquor industry and not the beer industry, keeping the current beer industry system in place. He stated that the letter could be sent out the following day.

Commissioner Madden moved that staff be instructed to explore rulemaking on discount pricing. Commissioner Cuevas seconded the motion. The motion carried.

LEGAL RESIDENCY UPDATE

Chairman Steen called upon David Garza, Director of Homeland Security, to provide an update on legal residency.

Mr. Garza stated that after the events of September 11, 2001, TABC—acting at the direction of the Texas Legislature—began applying substantially greater resources and efforts toward the licensing process,

specifically targeted at investigating whether applicants for alcoholic beverage licenses and permits were lawfully within this state and country as required by the Alcoholic Beverage Code. The Code does not have a definition of legal residency, which then lent itself to various interpretations. In order to assist TABC's investigators, Mr. Garza—in conjunction with General Counsel Lou Bright and Legal Director Gayle Gordon—drafted guidelines for the review and investigation of applications for TABC licenses or permits which involve questions of legal residency and qualifications to hold a license or permit (Attachment 3). The draft has been coordinated with several individuals and is currently being reviewed by lawyers who are board-certified in immigration law. Mr. Garza stated that the guidelines are not intended to provide rules for every situation that may arise; however, the guidelines will cover the majority of situations.

Chairman Steen asked if the guidelines were to be approved as policy. Administrator Steen stated that the guidelines would be for internal use and that the draft was being presented to the Commissioners as information only. **The Commissioners requested that they be given the opportunity to review the final draft before the guidelines were disseminated to staff; Mr. Garza agreed.**

FISCAL STEWARDSHIP REPORT: ANALYSIS OF TABC'S WORKFORCE

Chairman Steen called upon Loretta Doty, Director of Human Resources, to present TABC's workforce report.

Ms. Doty reviewed TABC's workforce report for 2004 (Attachment 4). At the end of fiscal year 2004, TABC's representation was 56% Caucasian, 34% Hispanic, 8% African-American, and 2% Other (Asian Pacific and American Indian). Ms. Doty compared categories of TABC's workforce with that of the statewide workforce. She also reported that there were a total of 101 new hires and 63 separations in FY 2004. Minorities comprised 39% of the new hires and 45% of the separations. Seventeen people retired in FY 2004.

Ms. Doty also reported on the following activities of the Human Resources Division in FY 2004:

- Increased the number of employment applications received for agency positions, a 58% increase from the previous year. There were 80 postings, averaging 23 applications per posting.
- Identified recruitment resources for advertised openings.
- Assisted divisions in updating interview methods and processes.
- Identified a core set of training classes for the agency, consisting of New Employee Orientation, Safety, Customer Service, Time Management, Liquor Law, Diversity, and Sexual Harassment/EEO.
- Developed a process for monitoring agency training needs through the use of Individual Development Plans (form included in Attachment 4).
- Began offering online New Employee Orientation and Sexual Harassment/EEOC classes.
- Created and facilitated training classes for Diversity, Time Management, and Customer Service.
- Added a methods and procedures specialist position—filled by Mary Cardwell—to the division temporarily to develop a standardized format for TABC policies and procedures (example of format included in Attachment 4).

Chairman Steen asked Administrator Steen if he had any concerns regarding any workforce trends or statistics. Administrator cited the problem of employee turnover, noting that TABC loses many employees to other agencies. Outside of that, he stated he felt that the agency was going in a good direction. He stated that the new decentralized process to hire people locally has helped.

Commissioner Cuevas asked Ms. Doty what the turnover rate was for non-certified peace officer staff. **Ms. Doty stated that she did not have the information at hand but could obtain it.** She stated that the agency turnover rate is 10.96%, which is below the statewide turnover rate.

INFORMATION TECHNOLOGY UPDATE/DEMONSTRATION

Chairman Steen called upon Garry Sitz, Director of Information Resources Division.

Mr. Sitz stated that he would discuss the status of the Versa project, which will replace the licensing-enforcement-compliance software, the imaging software, and the human resources information system.

Mr. Sitz reported the following on the Versa project:

- The project has undergone its second major data conversion. The conversion went well, and most of the data converted correctly. There will be a few more conversions before the system goes “live.”
- User acceptance testing begins next week, in which every feature and function will be tested.
- The core process system is being reengineered in order to match the functions of the new software.
- Additional software has been purchased to enable forms to be merged with data; then, images can be taken and stored.
- The core process system is being reengineered to match the functions of the new software.
- Staff are developing reporting requirements and have reviewed a 20-page list of reports to delete obsolete reports.

Mr. Sitz showed the display screens of the system. He summarized the Versa project update by stating that it is going well, it's on time, and it's on budget.

Mr. Sitz provided a brief update on the Mobius imaging system, stating that the agency is currently developing a scanning process for applications. He discussed the Human Resources Information System. The software has been installed, the data conversion has been completed, and staff are currently validating the converted data. Mr. Sitz gave a brief demonstration of the system. In response to Commissioner Cuevas' question on employee access to the system, Mr. Sitz stated that Loretta Doty and designated HR staff would have full privileges, managers would have access to information on their employees, and employees would have access to their own information.

Commissioner Cuevas asked who would be testing the system for security. Mr. Sitz stated that TABC has an agreement with the Department of Information Resources to do frequent penetration tests to ensure that security is valid. Mr. Sitz assured the Commissioners that appropriate security measures were being taken.

PUBLIC COMMENT

There was no one who wished to make public comment at this time.

Commissioner Madden stated that before the Commissioners went into executive session, she wanted to wish employees a happy holiday season and to thank them for their hard work.

Chairman Steen mentioned an ad he saw in the *Texas Monthly* on Texas Commission of the Arts specialty license plates. He then looked into the various specialty license plates that are available for sale, and saw that there were several state agencies that had the specialty plates. **He suggested that this be looked into for TABC, something along the lines of “don’t drink and drive.” He stated that this may be a way to generate monies for TABC education programs. Administrator Steen stated that this would be looked into.**

EXECUTIVE SESSION

Chairman Steen announced that the regular open session of the Texas Alcoholic Beverage Commission would be recessed, the time being 3:05 p.m., December 20, 2004, and an executive session would be held to consult with legal counsel regarding pending and anticipated litigation against the agency, pursuant to Texas Government Code §551.071, and to discuss the duties, responsibilities and evaluation of the administrator, pursuant to Texas Government Code §551.074.

Chairman Steen announced that the Texas Alcoholic Beverage Commission concluded its executive session and was in open session, the date being December 20, 2004, and the time being 3:54 p.m. He stated that no final action, decision, or vote was made in the executive session, and there were no matters requiring Commission action at that time.

NEXT MEETING: MONDAY, JANUARY 24, 2005

Chairman Steen announced that the next meeting of the Texas Alcoholic Beverage Commission was scheduled for January 24, 2005.

ADJOURNMENT

Commissioner Madden moved that the Texas Alcoholic Beverage Commission meeting be adjourned. Commissioner Cuevas seconded the motion. The motion carried, and the meeting adjourned.